Don Chavas, LLC d/b/a Tortillas Don Chavas *and* Mariela Soto and Anahi Figueroa. Cases 28–CA–063550 and 28–CA–067394

August 8, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On February 15, 2013, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel also filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as modified, and to adopt the recommended Order as modified and further discussed below.[3]

We affirm the judge's findings, for the reasons set forth in her decision, that the Respondent violated Section 8(a)(1) of the Act by (1) transferring employee Mariela Soto from the morning shift to the night shift because she engaged in protected activity by protesting the Respondent's supervisor Adrian Olguin's sexual harassment of female employees; (2) constructively discharging her through this shift transfer because the night shift conflicted with her childcare responsibilities; and (3) threatening employees Alan Pineda and Anahi Figueroa, and discharging them, for engaging in a work stoppage to protest poor work conditions.[4] However, for the reasons set forth below, we reverse the judge and find that the Respondent also violated Section 8(a)(1) by transferring Figueroa to the night shift and thereby constructively discharged her.

Two weeks after Olguin's father unlawfully discharged Figueroa for engaging in a work stoppage, the Respondent requested her return to work on her regular Friday to Monday day shift. Figueroa did return and, soon thereafter, she protested Olguin's unpacking of completed tortilla packets. Prior to beginning work on the next weekend, the Respondent transferred her to the night shift, an action which it knew conflicted with her childcare responsibilities and would force her to quit.

As with Mariela Soto, the complaint alleged that the Respondent violated Section 8(a)(1) by Figueroa's transfer and constructive discharge. The judge dismissed this allegation, however, finding no evidence that Figueroa's complaint about Olguin's unpacking of completed tortilla packets was protected concerted activity, and further finding that the General Counsel failed to prove the Respondent was motivated by animus against Figueroa's past protected activity when it transferred her. The General Counsel does not except to the judge's finding about the nature of the tortilla packing complaint, but he does assert in exceptions that there is substantial evidence that animus towards Figueroa's past protected activity motivated her transfer. We agree. Contrary to the judge, we find that the General Counsel carried his initial burden under *Wright Line*[5] to prove that animus against Figueroa's past protected activity was a motivating factor behind her transfer.

As noted above, the Respondent displayed considerable animus against Figueroa's earlier protected activity when it unlawfully threatened her and Pineda, and then discharged them, for engaging in a work stoppage. It also demonstrated animus against other protected activity when, in an action that closely parallels the Respondent's treatment of Figueroa, it unlawfully transferred and constructively discharged employee Soto for protesting Olguin's sexual harassment. In sum, this evidence of sustained animus against protected concerted activity, specifically including Figueroa's, is more than sufficient

[1] The Respondent argues that Judge Dibble's decision is invalid because she was appointed at a time when the Board was without a quorum. See *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014). The Respondent's argument is without merit. In this regard, on July 18, 2014, in an abundance of caution and with a full complement of five Members, the Board ratified nunc pro tunc and expressly authorized the selection of Judge Dibble to serve as an administrative law judge with this agency.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent asserts that the judge's findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contention is without merit.

[3] We shall amend the judge's conclusions of law in accordance with our additional finding herein

[4] The employees had been working short handed for several days, which forced them to spend more time working in parts of the Respondent's tortilla factory that had become excessively and dangerously hot because of the weather and the lack of sufficient cooling equipment in the factory.

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

to support an inference that, almost immediately after Figueroa returned to work from an unlawful discharge, the Respondent continued to discriminate against her by transferring her to the night shift. As with Soto, this shift change amounted to Figueroa's constructive discharge because, as the Respondent was aware, the change created an irreconcilable conflict with her childcare responsibilities. See, e.g., *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004) (employee constructively discharged after employer moved him from day shift to evening shift, which he could not work because of childcare responsibilities).

Having found that the General Counsel met his initial *Wright Line* burden, we further find that the Respondent did not meet its rebuttal burden to show that it would have discharged Figueroa absent her prior protected activity. In this regard, even though the judge dismissed the complaint allegation pertaining to Figueroa's constructive discharge, she discredited the Respondent's assertion that Figueroa was transferred because she was a good worker who was needed on the night shift to increase production. The judge noted that the Respondent provided no documentation of the night shift's alleged low production numbers. Accordingly, the Respondent has failed to prove any credible reliance on a legitimate reason for the transfer. We therefore find that the Respondent violated Section 8(a)(1) when it transferred her to the night shift and constructively discharged her in retaliation for her past protected concerted activity.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 6.

"6. By discriminatorily transferring employee Anahi Figueroa in mid-September 2011, from the day shift to the night shift because of her protected concerted activities, which caused her termination, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

AMENDED REMEDY

We shall modify the judge's recommended Order and substitute a new notice to conform to the violations found, and in accordance with our decisions in *J. Picini Flooring*, 356 NLRB No. 9 (2010), and *Durham School Services*, 360 NLRB No. 85 (2014). Because we find that Anahi Figueroa was unlawfully discharged again after she returned to work from her first unlawful discharge, her make-whole remedy should also take into account any loss of earnings and benefits she suffered as a result of both of these instances of discrimination.

As part of the remedy for the unlawful discharges of Soto, Figueroa, and Pineda, the judge recommended the tax compensation and social security reporting remedies that the Board announced in *Latino Express, Inc.,* 359 NLRB No. 44 (2012). At the time *Latino Express* issued, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, holding that the challenged appointments to the Board were not valid, we have considered de novo the rationale for the tax compensation and social security reporting remedies, and we find that those remedies effectuate the policies of the Act. Accordingly, for the reasons that follow, in this case and in all pending and future cases in which we find a violation of the Act that results in make-whole relief, we will continue routinely to require the respondent to (1) submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse the discriminatee(s) for any additional Federal and State income taxes the discriminatee(s) may owe as a consequence of receiving a lump-sum backpay award in a calendar year other than the year in which the income would have been earned had the Act not been violated.

I. THE ACT'S REMEDIAL SCHEME

Section 10(c) of the Act states that the Board shall order those found to have committed an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.[6] The underlying policy of Section 10(c) is "a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]."[7]

This is particularly the case with regard to backpay for victims of unlawful discrimination because "[a] backpay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice."[8] Accordingly, the Board has revised and updated its re-

[6] *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964)).

[7] *Trustees of Boston University*, 224 NLRB 1385, 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

[8] *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 3 (2010) (quoting *NLRB v. J.H. Rutter-Rex Mfg.*, supra at 263).

medial policies from time to time to ensure that victims of unlawful conduct are actually made whole (and for other reasons).[9] In providing for social security reporting and tax compensation as remedies for unfair labor practices, then, we follow a well-marked path.

II. REPORTING THE BACKPAY ALLOCATION TO THE SOCIAL SECURITY ADMINISTRATION

Under the Board's longstanding remedial policies, backpay is computed on the basis of separate calendar quarters or portions thereof but paid in one lump sum.[10] Because backpay is considered "wages" within the meaning of the Social Security Act,[11] a respondent must withhold social security taxes from a discriminatee's backpay award and remit that money to the government together with the social security tax owed by the respondent.[12] To ensure that a discriminatee will be made whole, however, backpay must be attributed to the proper periods for social security purposes.[13] Unfortunately, even when backpay covers multiple years, it is posted to the employee's social security earnings record in the year it is received—unless the employer or employee files with the SSA a separate report allocating backpay to the appropriate periods.[14]

When backpay is not properly allocated to the years covered by a backpay award, a discriminatee may be disadvantaged in three ways.[15] First, in order to qualify for old-age social security benefits, an individual must receive at least 40 social security credits; an individual can earn a maximum of four credits per calendar year.[16] Unless a discriminatee's multiyear backpay award is allocated to the appropriate years, she will not receive appropriate credit for the entire period covered by the award, and could therefore fail to qualify for any old-age social security benefit.

Second, if a backpay award covering a multiyear period is posted as income for 1 year, it may result in SSA treating the discriminatee as having received wages in that year in excess of the annual contribution and benefit base—the amount above which wages are not subject to social security taxes.[17] When the contribution and benefit base is exceeded, the employer and employee do not pay social security taxes on the excess, reducing the amount paid on the employee's behalf. As a result, the discriminatee's eventual monthly benefit will be reduced because participants receive a greater benefit when they have paid more into the system.

Third, social security benefits are calculated using a progressive formula: although a participant receives more in benefits when she pays more into the system, the rate of return diminishes at higher annual incomes.[18] Therefore, a retiring discriminatee can receive a smaller monthly benefit when a multiyear award is posted to 1 year rather than being allocated to the appropriate periods, even if social security taxes were paid on the entire amount.[19] Permitting a discriminatee to suffer these dis-

[9] See, e.g., *F.W. Woolworth Co.*, 90 NLRB 289, 292–293 (1950) (backpay computed on quarterly basis); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962) (interest on backpay awards), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963); *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968) (limited backpay remedy as part of remedy for unlawful failure to bargain over effects of plant closing); *Kentucky River Medical Center*, supra at 5–6 (interest on backpay awards compounded daily).

[10] *F.W. Woolworth Co.*, supra at 292–293. Backpay is computed on the basis of calendar quarters under *F.W. Woolworth* when an unfair labor practice results in a cessation of employment status, such as a discriminatory discharge in violation of Sec. 8(a)(3). When a violation of the Act does not involve cessation of employment status, backpay is computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). See, e.g., *Raven Government Services*, 336 NLRB 991, 992 (2001), enfd. sub nom. *Raven Services Corp. v. NLRB*, 315 F.3d 499 (5th Cir. 2002). Under either formula, however, backpay is paid in one lump sum. Accordingly, our reasoning applies to any violation of the Act that results in make-whole relief, both those that involve cessation of employment status and those that do not (such as unilateral changes in terms and conditions of employment in violation of Sec. 8(a)(5)).

[11] See *Social Security Board v. Nierotko*, 327 U.S. 358, 364–365 (1946).

[12] There is one exception to this general rule: backpay owed by a respondent that has never been an employer of the discriminatee is not considered wages for FICA purposes, so there is no withholding obligation and no employer contribution is payable. See *Teamsters Local 249 (Lancaster Transportation Co.)*, 116 NLRB 399, 400 (1956), enfd. 249 F.2d 292 (3d Cir. 1957). Accordingly, Part II of the Amended Remedy section of this decision applies only to backpay payable by a current or former employer of the discriminatee, including by an employer respondent that is subject to joint and several liability with a nonemployer respondent.

[13] As the Supreme Court held in *Nierotko*, above, backpay "should be allocated to the periods when the regular wages were not paid as usual." 327 U.S. at 370. See also *F.W. Woolworth*, supra at 293.

[14] See *I.R.S., Reporting Back Pay and Special Wage Payments to the Social Security Administration 2*, Pub. 957 (Jan. 2013), available at http://www.irs.gov/pub/irs-pdf/p957.pdf.

[15] We focus here on old-age benefits, but similar effects can occur with respect to the disability component of the social security program.

[16] See generally S.S.A. Federal Old-Age, Survivors and Disability Insurance, 20 C.F.R. pt. 404 (2013). In 2014, employees will receive one credit for every $1200 of social security–covered wages they earn, up to the maximum four credits. Cost-of-Living Increase and Other Determinations for 2014, 78 Fed. Reg. 66,413-01 (Nov. 5, 2013).

[17] In 2014, the annual contribution and benefit base is $117,000. Id.

[18] See 42 U.S.C. § 415(a) (2014) (describing calculation of the Primary Insurance Amount, one factor used in calculating the monthly benefit).

[19] This effect can be demonstrated by using the S.S.A.'s Online Benefits Calculator, available at http://www.ssa.gov/retire2/AnypiaApplet.html. Compare two employees who both were (1) born in 1950; (2) began work in 1975; (3) earned $15,000 in 1975 with annual $100 raises; and (4) retired in 2010 after 35 years of work. In 1985, employee B received a 4-year backpay award as a result of an unlawful discharge and regular wages following

advantages contravenes our "desire to avoid prejudic[ing] the employee's rights under other social legislation designed to preserve the continuity and stability of labor remuneration."[20] If an employee continues to suffer the effects of unlawful discrimination throughout retirement, she has not been made whole and the respondent has not restored the situation, as nearly as possible, to that which would have obtained but for the commission of the unfair labor practice.[21]

In addition, an employee could be disadvantaged by receiving a lump-sum backpay award in a different calendar quarter than the income would have been earned absent the unfair labor practice, even when the award is received in the same calendar year as the backpay period the award covers, because the employee could fail to qualify for a social security benefit by failing to amass the statutory minimum of 40 calendar quarters.

For these reasons, we shall continue to require the filing of a report with the SSA allocating backpay awards to the appropriate calendar quarters. We shall apply this policy to all pending cases in whatever stage, including compliance.[22] All parties are on notice of the SSA reporting requirement by virtue of the many cases in which a properly constituted Board has required such reports. Moreover, the burden of complying with the requirement is minimal.[23]

III. COMPENSATING EMPLOYEES FOR EXCESS INCOME TAX LIABILITY

As stated above, backpay is payable in one lump sum. The IRS considers a backpay award to be income earned in the year the award is paid, regardless of when the income should have been received.[24] Because of the progressive nature of Federal and some State income taxes, an employee who receives a lump-sum backpay award in a calendar year other than the year in which the income would have been earned had the Act not been violated may be pushed into a higher tax bracket, and consequently may owe more in income taxes than if she had received her wages when they were or would have been earned. The result is that the discriminatee is disadvantaged a second time. The purpose of our tax compensation remedy, like that of the social security reporting requirement, is to ensure that an employee who receives lump-sum backpay rather than regular income is truly made whole.

In addressing the need to compensate employees for the heightened tax burdens they face as a result of discrimination against them, we note that both courts[25] and administrative agencies[26] have ordered such relief, essentially for the same reasons that we find it appropriate. When, for example, the Third Circuit first approved a district court's imposition of a tax compensation remedy, it observed that a principal remedial purpose of employment statutes is "to make persons whole for injuries suffered on account of unlawful employment discrimination,"[27] and that in exercising discretion in fashioning remedies, district courts should endeavor "to restore the employee to the economic status quo that would exist but for the employer's conduct."[28] The court held that without this type of equitable relief in appropriate cases, it would not be possible to fully restore the employee to the economic status quo.[29] Although the court was fashioning a remedy for discrimination under the Americans with Disabilities Act, its reasoning applies with equal force to the vindication of rights under the NLRA.[30]

For these reasons, we shall continue routinely to require respondents to compensate employees for the adverse income tax consequences of receiving lump-sum

her reinstatement; employee A received the regular wage throughout. At full retirement age, employee A is eligible for a $1391 monthly benefit, while employee B is entitled only to a $1314 monthly benefit.

[20] See *F.W. Woolworth Co.*, supra at 293 (internal quotation marks omitted).

[21] See *Trustees of Boston University*, supra at 1385.

[22] See, e.g., *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002).

[23] Respondents will continue to use the standard form developed by the General Counsel to elicit the information the SSA requires. See General Counsel Memorandum 13-03, *Reimbursement of Excess Income Taxes Paid and Reporting of Backpay Allocation to the Social Security Administration* (Feb. 15, 2013), Attachment 2: "Report of Backpay Paid Under the National Labor Relations Act."

[24] See *I.R.S. Rev. Rul.* 78–336, 1978–2 C.B. 255 (1978); *I.R.S. Rev. Rul*. 8–35, 1989–1 C.B. 280 (1989); see also *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 203 (2001).

[25] See, e.g., *Sears v. Atchison, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984), cert. denied 471 U.S. 1099 (1985) (Title VII of the Civil Rights Act of 1964); *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 447 (E.D. Pa. 2000) (Age Discrimination in Employment Act); *Powell v. North Arkansas College*, 08–CV–3042, 2009 WL 1904156, at *3 (W.D. Ark. 2009) (Family and Medical Leave Act).

[26] See, e.g., *Van Hoose v. Pirie*, No. 94–60050–N01, 2001 WL 991925, at *3 (EEOC Aug. 22, 2001); *Doyle v. Hydro Nuclear Services*, No. 99–041, 2000 WL 694384, at *8–10 (DOL Admin. Rev. Bd. May 17, 2000), revd. on other grounds sub nom. *Doyle v. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002), cert. denied 537 U.S. 1066 (2002).

[27] *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 440 (3d Cir. 2009) (quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975)).

[28] Id. (quoting *In re Continental Airlines*, 125 F.3d 120, 135 (3d Cir. 1997)).

[29] Id. at 442.

[30] We reaffirm the tax compensation remedy as a matter of make-whole relief. We note, however, that enhanced monetary remedies also serve to deter the commission of unfair labor practices and encourage compliance with Board orders. See *Kentucky River Medical Center*, supra at slip op. at 4. In this respect, the tax compensation remedy helps achieve our statutory goal of preventing unfair labor practices. See Sec. 10(a) of the Act.

backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated, including when the backpay period is less than 12 months. We are concerned with the difference between the employee's income tax liability in the year when she receives a lump-sum award and the income tax she would have paid if she had received her wages when they were or would have been earned. It is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award. Such matters have been and shall continue to be resolved in compliance proceedings, where we shall continue to require that the amount sought be specifically pleaded in the compliance specification. If the General Counsel pleads a specific adverse tax consequence and supports that amount with evidence and a reasonable calculation, the burden will then shift to the respondent to rebut the General Counsel's evidence or calculations.

Finally, as with the social security reporting requirement, we shall apply the tax compensation remedy retroactively to all pending cases in whatever stage, including compliance. As before, Respondents will have the opportunity in compliance to fully litigate the propriety of a particular tax compensation remedy in each case where one is sought.[31]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Don Chavas, LLC d/b/a Tortillas Don Chavas, Tucson, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at the Respondent's Tucson, Arizona tortilla facility and all its other factories (if applicable) in the State of Arizona, in both English and Spanish, a copy of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2011.

2. Add the following as paragraph 2(c) and renumber subsequent paragraphs.

"Compensate Mariela Soto, Alan Pineda, and Anahi Figueroa for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 8, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[31] *Laborers Local 282 (Austin Co.)*, 271 NLRB 878 (1984); *Hendrickson Bros*., 272 NLRB 438 (1985); and their progeny are overruled to the extent they are inconsistent with today's decision.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or constructively discharge you for engaging in protected concerted activities.

WE WILL NOT threaten you with discharge if you engage in protected concerted activities.

WE WILL NOT transfer you to less desirable shifts for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Mariela Soto, Alan Pineda, and Anahi Figueroa full reinstatement to their former jobs or, if any of those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mariela Soto, Alan Pineda, and Anahi Figueroa whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Mariela Soto, Alan Pineda, and Anahi Figueroa for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and constructive discharges of Mariela Soto, Anahi Figueroa, and Alan Pineda and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any manner, including but not limited to, as a basis for future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

DON CHAVAS, LLC D/B/A TORTILLAS DON CHAVAS

The Board's decision can be found at www.nlrb.gov/case/28-CA-063550 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Sophia Alonso, Esq., Paul Irving, Esq., and *John Giannopoulos, Esq.,* for the General Counsel.
John J. Munger, Esq. and *David Ruiz, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. The case was tried in Tucson, Arizona, on August 22–24, 2012, and October 1–3, 2012.[1] Mariela Soto (Soto) filed the charge in Case 28–CA–063550 on August 29, 2011. Anahi Figueroa (Figueroa) filed the charge in Case 28–CA–067394 on October 24, 2011. Figueroa filed an amended charge in Case 28–CA–067394 on November 28, 2011. The Regional Director for Region 28 of the National Labor Relations Board (NLRB/Board) issued an order consolidating cases, consolidated complaint and notice of hearing on November 30, 2011. Respondent filed a timely answer on December 13, 2011, denying all material allegations in the consolidated complaint. By motion dated September 7, 2012, the Acting General Counsel (General Counsel) for NLRB moved to amend the complaint to include re-numbering of paragraphs 2(j), to 2(o), 4(i) to 4(j), and 4(j) to 4(k). The General Counsel's motion to amend also included a request to add paragraph 4(i). Paragraph 4(i) reads as follows:

> Since about September 4, 2011, Respondent, by Jesus Arturo Olguin, by telephone, threatened its employees with discharge because they ceased working concertedly and engaged in a strike.

By Order dated September 19, 2012, I granted the motion to amend. *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994).

The amended complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when (1) on or about July 7, 2011, Respondent transferred Soto to a different work shift, thus causing her termination; (2) on or about September 4, 2011, Respondent, by Jesus Arturo Olguin (Olguin), by telephone, threatened its employees with discharge because they stopped working concertedly and engaged in a strike; (3) on or about September 4, 2011, Respondent discharged employees Figueroa and Alan Pineda (Pineda); and (4) in or about mid-September 2011, Respondent transferred Figueroa (who had been rehired) to a different work shift thus causing her termination.

Based on the entire record, including my observation of the witnesses' demeanor, and after considering the General Counsel's and Respondent's briefs, I make the following

[1] All dates are in 2011, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Arizona limited liability company with an office and place of business in Tucson, Arizona, produces, distributes, and sells tortillas and related products.

Respondent contests the Board's jurisdiction in this matter. Respondent argues that it has not during the past 12 months and at all material times purchased and received, at its facility in Tucson, Arizona, goods valued in excess of $50,000 directly from points outside the State of Arizona. Respondent admits it engaged in commerce outside the State of Arizona but contends the dollar amounts are below the jurisdictional requirements and have a de minimis effect on interstate commerce.

The General Counsel argues that under an indirect inflow theory of the case, Respondent meets the jurisdictional requirements of the Act. Indirect inflow refers to the purchase of goods or services that originated outside of the employer's state, but purchased by the employer from a seller in the state.

In *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1(1937), the Supreme Court held that the Commerce Clause of the U.S. Constitution gave Congress the authority to regulate labor disputes of employers whose activities "affected" interstate commerce, thus upholding Section 10(a) of the National Labor Relations Act (NLRA/Act). Section 2(6) & (7) of the Act defines "commerce" and "affecting commerce." This statutory jurisdiction to regulate labor disputes includes both unfair labor practices and representation questions. Due to the broad powers granted it to regulate industrial relations of employers engaged in interstate commerce, the Board never found it effective to exercise its full powers. Therefore, over time, the Board exercised its discretion to decline jurisdiction in certain areas. In 1950, the Board developed jurisdictional standards for a uniform assessment of determining jurisdiction, with modifications of the standards in 1954 and 1958. However, the Board's use of its discretionary powers to exercise jurisdiction resulted in Supreme Court rulings and Congress limiting the Board's power to decline jurisdiction. Congress added Section 14(c)(1) & (2) in the Landrum-Griffin amendments of 1959. Thus Congress approved of the Board declining jurisdiction involving an entire class of smaller employers, but prohibited it from declining over employers covered under the jurisdictional standard in effect on August 1, 1959. Nonetheless, the Board continues to have broad discretion to decline jurisdiction. The federal courts have uniformly observed that the Board is not required to adhere to its jurisdictional standards but usually follows it. The court in *NLRB v. Erlich's 814*, 577 F.2d 68, 71 (8th Cir. 1978), noted an administrative standard "is a discretionary standard which the Board has imposed upon itself. Where statutory jurisdiction exists . . . the Board had the administrative discretion to disregard its own self-imposed jurisdictional yardstick." However, the Board cannot assert jurisdiction if the employer's business does not involve interstate commerce that exceeds the de minimis level. Monetary sums far smaller than those at issue have been found by the Board to exceed the de minimis level. (*Marty Levitt*, 171 NLRB 739 (1968), held that $1500 in out-of-state activities "is more than the trifle or matter of a few dollars, which the courts have characterized as de minimis.")

Respondent argues that because it sold exclusively to in-state businesses and purchased solely from in-state enterprises, it has not engaged in interstate commerce within the meaning of Section 2(6). In addition, Respondent contends jurisdiction is not proper because the alleged unfair labor practices are not "the type of intrastate activities that if widespread, would substantially decrease the flow of interstate commerce." (R. Br. p. 13.)[2]

I find that the alleged unfair labor practices at issue are exactly the type of activities Congress envisioned when passing the Act. Changing the terms and conditions of employment in retaliation for engaging in concerted activity would tend to lead to a labor dispute that would "burden or obstruct commerce" or the "free flow" of commerce. Respondent admitted that the alleged actions had caused the loss of customers. Therefore, presumably, reducing the amount of goods sold intrastate and the amount of supplies needed to purchase from interstate suppliers, thus burdening the "free flow" of commerce. Stoppage or disruption of work in Tucson involves interruptions in the steady stream into and out of Arizona, of credit, cash, and supplies. Congress has explicitly regulated transactions and goods in interstate commerce and also activities which in isolation might be found to be "merely local but in the interlacings of business across state lines adversely affect such commerce." See, *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944); *NLRB v. Reliance Fuel Oil Corp*., 371 U.S. 224 (1963).

Although Respondent argues the Board's assertion of jurisdiction is inappropriate because it conducts business intrastate, under the indirect inflow theory of jurisdiction the evidence clearly establishes that the jurisdictional standard has been met.

The evidence establishes that Respondent purchased the majority of its supplies from Food Source International, LLC (FSI), a wholesale supplier of baking and food products with its office located in Tempe, Arizona. Weston Huber (Huber), office and operations manager for FSI, testified on behalf of the General Counsel. FSI supplies Respondent with wholesale baking ingredients. Huber explained the record keeping system he utilized to track the products sold to Respondent, the price Respondent paid for the products, and the state of origin of the products. (Tr. p.170, 190, 193, 195–196, 206.) Huber produced evidence establishing that Respondent purchased and received goods totaling $51,755.50 from FSI for the period August 2011 through July 2012. (GC Exhs. 9, 10.) FSI purchased the supplies it sold to Respondent from out of state vendors. (GC Br. p. 13, 15, 16; GC Exhs. 12, 13; Tr. p.140, 161.)

Juan Valdez, owner of A & P Paper & Plastic Supplies (A & P), testified that his company supplied Respondent with tortilla bags from October 2010 through March 2012. (Tr. p. 626.) He noted that the bags supplied to Respondent were purchased by his company from a supplier in California. The documentary evidence establishes that A & P provided Respondent with supplies totaling $6,286.40. (Tr. p. 626–630; GC Exh. 36.) Additionally, Respondent paid life and property insurance pre-

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC" for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R Br." for Respondent's brief.

miums to American Family Insurance (AFI). AFI's billing statements were sent to Respondent from Wisconsin and Respondent in turn sent its premium payments to Wisconsin. Respondent paid $5,028.40 in insurance premiums for the period at issue. (GC Exhs. 19, 20, 34.)

Respondent does not specifically dispute the dollar figures set forth above, but rather contends the jurisdictional standard has not been met because FSI "marked up" the cost of the products sold to Respondent. Under Respondent's theory, the jurisdictional amounts should be calculated based on the price FSI paid for the goods before selling them to Respondent. (R. Br. p. 16.) However, Respondent provides no case law and I can find none to support this argument.

I also reject Respondent's argument that the period in which purchases from suppliers other than FSI were made may not be considered because the "additional amounts the government attempts to include are from a variety of different time periods that do not correspond with the FSI evidence. To allow the government to include these additional amounts would be to allow the government to base its discretionary dollar amount on a representative period of time well beyond the 12 months allotted." (R. Br. p. 18.) Even assuming that Respondent's argument has merit, the total dollar amount from FSI alone is sufficient to meet the statutory and jurisdictional standards and is more than a de minimis amount. Clearly, Respondent purchased and received more than $50,000 in products which originated outside of the state of Arizona. Including the amounts from A & P and AFI, the evidence of record establishes that more than the minimum jurisdictional amount has been met.

Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. SUPERVISORY AND AGENCY STATUS OF ADRIAN OLGUIN

The General Counsel alleges that Respondent's son, Adrian Olguin (Adrian), is a supervisor or, in the alternative, an agent of Respondent.[3] However, Respondent disagrees with this designation, asserting Adrian was merely a worker.

The burden of establishing supervisory status is with the party alleging that status. The party asserting supervisory status must set forth specific facts which prove the existence of supervisory authority. Under Section 2(11) of the Act, the status of supervisor is determined by the duties performed and not the title or job classification. Section 2(11) defines a supervisor as any person

> having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Act also provides that an individual who is an agent of the employer is, in effect, the employer for purposes of assessing responsibility in matters over which the Board has jurisdiction. The Board applies common law principles to determine if an individual possesses apparent authority to act for an employer. In *Comau, Inc*., 358 NLRB No. 73, slip op. at 3 (2012), the Board listed the principles as (1) an indication by the principal to a third party that creates a reasonable belief that the alleged agent has been authorized by the principal to act; and (2) the principal intended or should have realized that its conduct is likely to create the third party to believe the agent is authorized to act for the principal. See *Pan-Oston Co*., 336 NLRB 305, 305–306 (2001).

Adrian started his employment at the company in 2011. Adrian worked the production line and assisted Respondent with the daily operations of the factory and store. When Olguin was absent from the factory, Soto, Figueroa, and Pineda observed Adrian grant time off to employees, schedule shifts, assign job tasks, resolve employee and customer complaints, receive products from vendors, and resolve vendor disputes. (Tr. 353–356, 368–372, 453–466, 550, 553–561.) Olguin arrived at the factory at 7 a.m. to collect the tortillas produced on the night shift and left soon after to deliver products to his customers. In his absence, Adrian assigned Soto job tasks and addressed her workplace complaints. Soto observed Adrian address customer complaints, operate the register in the retail store, sign vendor invoices, accept mail, and compose the employees' work schedules. (Tr. 553–556.) She was also aware of Adrian changing the shifts of two employees, Eduardo and Donaeva (last names unknown). Soto admitted that she would make requests for days off work to Olguin but also has, on occasion, made the same requests to Adrian. (Tr. 557.) Likewise, Pineda observed Adrian accept delivery of weekly supplies from vendors, requested days off from Adrian in Olguin's absence, and made workplace complaints to Adrian in Olguin's absence. (Tr. 353–356.) Figueroa observed Adrian address customer complaints, conduct inventory, and order supplies from vendors. (Tr. 452–463.)

The evidence establishes that Adrian meets the statutory definition of supervisor. Adrian was intimately involved in the daily management of the factory and workers. Olguin admitted that he was infrequently at the factory and in his absence Adrian had the authority to resolve "problems" that arose. (Tr. 21, 272.)[4] Despite Respondent's assertion that Adrian did not ex-

[3] Despite being subpoenaed by the General Counsel to testify at the hearing, Adrian Olguin did not appear.

[4] Olguin testified that Adrian was not allowed to independently make decisions. He contended Adrian had to consult with him each time he signed for a purchase order from a supplier or assigned workers' schedules. Olguin stated Adrian and various other employees staffed the cash register. He agreed that Adrian received and opened the mail but only if given permission by him. He denied that Adrian independently made decisions to order supplies, but rather insisted Adrian had to call him to ask what supplies should be ordered. According to Olguin, Adrian notified him of customer or employee complaints, which he would resolve or tell Adrian how to resolve them. (Tr. 221–228, 232, 235–236, 238.) Olguin also testified that Adrian was not allowed to interview or hire new workers. (Tr. 830–833.) I do not credit Olguin's testimony that he did not allow Adrian independent authority to make decisions in the workplace. Olguin acknowledged that he was frequently away from the factory making deliveries to customers. He also admitted that if there was a "problem" at the factory while he was away, Adrian had the authority to resolve the issues.

ercise independent judgment in performing his job duties, the evidence is to the contrary.[5] Adrian assigned employees' daily tasks, changed employees' shifts, mediated workplace disputes, and instructed employees on the number of tortillas to produce daily. It should again be noted that none of the witnesses contradicted the testimony of Soto, Figueroa, and Pineda that they observed Adrian perform these, and other, uniquely supervisory duties.

Adrian also meets the definition of an agent based on the apparent authority test. The employees were aware of the familial connection between Olguin and Adrian. The Board has held that family relationship is a factor to consider in determining apparent authority and when viewed based on the totality of the record, may be sufficient to find agency based on apparent authority. *Laborers Local 270 (OPEIU Local 29)*, 285 NLRB 1026, 1028 (1987). Olguin used Adrian to communicate his instructions to the employees. (Tr. 21–23, 221–238.) Thus, intending to cause the employees to believe that Respondent had authorized Adrian to oversee factory operations and resolve employee concerns. He also testified that Adrian informed him of "everything" because of the trust they had for each other. (Tr. 23.) There is no evidence that Olguin placed this type of unqualified trust to carry out his instructions in any employee other than Adrian.

Based on Adrian's role as Respondent's "mouthpiece," authority to interface with customers, vendors, and employees to resolve to disputes, and Respondent's admitted implicit trust in Adrian as his son and confidante, I find that Soto, Figueroa, and Pineda would reasonably believe that Adrian was reflecting the company policy and acting on behalf of Respondent. See, *Guille Steel Products Co.*, 303 NLRB 537, 539 (1991).

I find, therefore, that the evidence establishes Adrian meets the definition of a supervisor and an agent as set forth in Sections 2(11) & (13) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

1. Overview of Respondent's operation

As noted above, Respondent operates a tortilla production factory. The tortilla factory operates 24 hours each day. Respondent also has a retail store in a portion of the building that houses the tortilla factory. The retail store is open to the public from 8 a.m. to 8 p.m. (Tr. 450, 545). Respondent distributes and sells its products to businesses within the state of Arizona. (GC 2; Tr. 34–35). The company employs approximately eight (8) tortilla production workers to staff two shifts. The morning shift encompasses the hours of 4 a.m. to 4 p.m. and the evening shift is from 4 p.m. to 4 a.m. Two of the eight employees work a weekend shift from Friday through Monday to cover the days employees on the Sunday through Thursday shifts are not at work. The evidence of record establishes that occasionally some workers are scheduled to start at 6 a.m. for the morning shift or 2 p.m. for the evening shift.

The tortilla workers are responsible for working the production line to produce tortillas. A normal shift produces 70 packages of tortillas an hour. Each package contains a dozen tortillas for a total of 840 packages on both shifts. The production line consists of four stations: "boleadora" (machine which creates the dough), "wheel" (machine which presses the dough into a tortilla shape), griddle (cooks the dough), and packing area (the station used to package the tortillas). During a fully staffed shift, a worker spends approximately ½ hour at a station per hour. (Tr. 491–492, 808–810.)

Olguin is the owner, president, and manager of Respondent and has held those positions since purchasing the business in approximately 2010. (Tr. 80, 83–85.) Olguin is also the sole member of the limited liability company.

Adrian worked from 8 a.m. to 6 p.m. and he oversaw the workers on the morning shift and a portion of the evening shift. In Olguin's absence from the factory, Adrian had the authority to resolve employee and customer complaints. Olguin communicated instructions to the employees through Adrian. Adrian approved employee shift changes, operated the retail store's cash register, received company mail, signed vendor invoices, and conducted inventory.

Soto first began working for Respondent as a tortilla production worker in mid-year 2009 until March 2010. She returned to the job in the summer of 2010 and worked until Davila, title unknown, terminated her at the end of 2010. As a result of that termination, Soto filed a complaint with the Human Rights Commission and was subsequently rehired a month later. Upon her rehire in early 2011, she was assigned to the same shift she had worked prior to her termination (4 a.m. to 4 p.m. Monday through Friday). Throughout her periods of employment with Respondent, Soto was assigned to work from 4 a.m. to 4 p.m. Friday through Monday. (Tr. 549–550.)

Figueroa was hired by Respondent in February 2011 as a tortilla production worker. She was assigned to work Friday through Monday from 4 a.m. to 4 p.m., except for 4 days in August when she was assigned to the night shift to accommodate her mother's illness. (Tr. 507–508, 511–512.) Due to a dispute with Adrian about workplace conditions, on September 4, 2011, Figueroa and Pineda walked off the job. Subsequently, Respondent contacted her and offered to rehire her into her former position. Figueroa agreed and Respondent rehired her in approximately mid-September 2011. Figueroa was again assigned to work from 4 a.m. to 4 p.m. Friday through Monday.

(Tr. 21.) Soto, Figueroa, and Pineda credibly testified Adrian frequently made managerial decisions without first consulting Olguin. Adrian provided no testimony or sworn affidavit contradicting them on this point. Although coworkers Yolanda Gonzalez (Gonzalez), Jesus Arvizu (Arvizu), Esmeralda Graciano (Graciano), and Marcos Arvizu (M. Arvizu) testified they did not perceive Adrian to have supervisory status, they did not contradict the testimony of Soto, Figueroa, and Pineda that they observed him perform uniquely supervisory job duties.

[5] Olguin attempted to minimize Adrian's authority over the employees by testifying that in his absence from the factory, he would often leave Benjamin Rodolfo (Rodolfo) or Alma Davila (Davila) in charge of the facility. (Tr. 327–328.) However, I do not credit his testimony on this point. Neither employee provided testimony to corroborate Respondent on this point. Further, Respondent was unsure if the tenure of their employment corresponded to the time frame at issue. Finally, there was more persuasive and probative testimony from Soto, Figueroa, and Pineda that Adrian (and not Benjamin or Davila) was most likely to resolve issues and issue instructions in Respondent's absence. I credit their testimony on this point. The evidence establishes that many of the employees perceived Adrian to be a supervisor and have the authority to speak on behalf of Respondent.

Approximately a week after she was rehired to work the day shift, Respondent transferred her to the evening shift. (Tr. 514)

Pineda was employed with Respondent on three (3) separate occasions.[6] He worked for the tortilla factory in 2010 and 2011. He was employed with the Respondent approximately 8 months in 2010. In February 2011, Pineda returned to work at the tortilla factory with a schedule of six (6) days a week from 4 a.m. to 4 p.m. (Tr. 353).

2. Workers' complaints regarding workplace conditions

Beginning in the summer of 2011, Soto and other workers began to complain to each other about malfunctioning equipment, excessive heat in the factory, lack of proper pay, and workplace injuries, and workplace sexual harassment.

Workers' Complaints about Wages

Soto and Figueroa on several occasions discussed Respondent's failure to pay them overtime. Figueroa, like Pineda and Soto, protested the lack of pay for overtime work. She encouraged her coworker, Macario, to join her in telling "Arturo [Olguin] to pay us the extra hours that we were putting in so that we could—that way, we could make a little bit more money." (Tr. 485–486.) Pineda also discussed with the Soto and Figueroa and complained to Olguin about Respondent's failure to pay them the legally mandated minimum wage or for overtime worked. (Tr. 359–360.) [7]

Workers' Complaints about Malfunctioning Equipment and Excessive Heat

During the summer, Soto, Figueroa, and Pineda began to complain among themselves about the excessive heat inside the factory, compounded by the malfunctioning equipment. Soto reported machine breakdowns to Respondent and discussed with her coworkers the physical effects some of the machine malfunctions had on them. She noted that she and other coworkers complained to management that faulty gas burners on the grill caused excessive fumes resulting in headaches. (Tr. 557, 565–566.) Soto observed Pineda suffer an asthma attack because a broken part on one of the machines caused excessive heat inside the factory. Sotoreported the problem to Adrian but it was not fixed. Respondent was aware of employee complaints regarding malfunctioning equipment and excessive heat inside the factory. Workers also complained to Olguin about the broken extractor used to cool the equipment. In the summer of 2011, the employees told him the extractor was not properly cooling the facility and making it too hot. Olguin also acknowledged other instances of machine malfunctioning during the period at issue, which he must have been informed about from his workers because, according to his testimony, he spent little time in the factory. (Tr. 272–273.)[8]

In the summer of 2011, a machine malfunctioned causing it to become too hot inside the factory for some of the workers, including Pineda. Pineda complained to Respondent that the heat in the factory worsened his asthma and he heard other workers complain among themselves about painful urination and peeling skin as a result of the heat. He asked Respondent to resolve the uncomfortable working conditions. (Tr. 363–365.) Throughout the summer, however, the heat inside the factory continued to exacerbate Pineda's asthma and make it physically uncomfortable for other workers.

Workers' Complaints about Workplace Injuries & General Working Conditions

Pineda discussed with Soto, Figueroa, and other workers steps management should take to lessen workplace injuries. Pineda suffered injury and observed that other workers injured themselves working on the machines because they were not provided with the proper safety equipment. For example, while cleaning the wheels and blades on the equipment, Pineda suffered burns to his arms and hands. He also noted that several of his coworkers burned their hands and arms from cleaning the griddle. (Tr. 378–381.) He told Adrian that Respondent needed to purchase protective gloves for the workers to use to avoid getting burned by the griddle. Respondent never purchased effective protective gloves. (Tr. 381–382.)

Pineda discussed with his coworkers actions they could take to improve their working conditions. He noted Respondent gave workers only one 15 minute break in a 12 hour work day. After much discussion among them, Pineda and several coworkers asked Respondent for a few extra minutes of break time. There is no evidence that Respondent acquiesced to their demands. Pineda also complained to Respondent about the lack of drinking water for the employees. (Tr. 383–384.)

Soto's and Figueroa's Complaints of Being Subjected to Sexual Harassment

Figueroa spoke with other coworkers about sexual harassment she was subjected to by Adrian. She and Soto observed Adrian treat a female coworker, Lucia, more favorably in granting absences from work because she allowed him to fondle her. (Tr. 471.)[9] Figueroa also discussed with Soto that Adrian made sexual advances towards her, which she rejected. (Tr. 472–483.) In addition to Soto, she also talked about Adrian's behavior towards her with another coworker, Chella (last name unknown).[10] Figueroa conversed with Pineda about the excessive

[6] The record is unclear on the specific dates for the three separate periods Pineda was employed by Respondent.

[7] Olguin testified that none of the employees complained to him about his failure to pay them minimum wage or for overtime worked. I do not credit Olguin's testimony on this point. Unlike the charging parties, Olguin could not provide any corroborating evidence to refute the witnesses' testimony that they complained to him on several occasions about Respondent's failure to provide them with overtime pay or legally mandated minimum wage.

[8] Olguin claims not to recall which workers informed him of the malfunctioning equipment. Gonzalez testified that she heard workers complain to Olguin about broken equipment but did not specify the employees. Therefore, the only testimony that identifies with any specificity the individuals complaining to him about faulty equipment are Soto, Figueroa, and Pineda. Therefore, I credit their testimony on this point that they complained among themselves and to Respondent regarding excessive heat inside the factory and the adverse physical effects they experienced.

[9] There was no testimony from Lucia or Adrian refuting Soto's and Figueroa's testimony on this point.

[10] Although, Chella did not testify at the hearing and corroborate Figueroa on this point, I credit Figueroa's testimony because it is con-

heat inside the factory, which caused them to get sick.

Soto encouraged Figueroa to complain to Olguin about the sexually harassing nature of Adrian's remarks and actions towards her in the workplace. Soto and Figueroa complained among themselves the preferential treatment Adrian showed towards "Lucia" because "she would allow him to grab everything and she would hide in the bathroom with him." (Tr. 571.) Other examples of Adrian's sexually harassing behavior included, placing his hands towards Soto's breasts and commenting on their size and remarking on the size of Figueroa's buttocks and vagina. (Tr. 574–575.)[11]

3. Soto's shift change and subsequent termination

Approximately fifteen (15) days before July 3, Soto asked Respondent if she could be absent from work that day because she wanted to go shopping for her children. She noted that Olguin told her "to tell Adrian because he wasn't in charge of the scheduling or time off." (Tr. 576–577.)[12] Therefore, a few days prior to July 3, Soto told Adrian that Olguin instructed her to ask him for permission to be absent from work on July 3. Adrian denied her request. Soto again approached Olguin and asked to take July 3 off. It is undisputed that during this conversation he allowed her to take July 3 as an authorized absence.

On July 4, 2011, Soto reported for duty at her normally scheduled time, 4 a.m., but a coworker, Francisco, greeted her at the factory door and informed her she was not scheduled to start work until 6 a.m. No one from the factory had called to notify her of the change. Adrian was standing behind Francisco laughing at her while Francisco told her she could not come into the facility until her start time of 6 a.m. (Tr. 579–580.) Soto waited outside the factory until 6 am to begin work.

Later the same day (July 4) an argument occurred at the factory involving Soto, Figueroa, and Adrian. The argument began when Adrian entered the factory stating, ". . . he didn't give a fuck if he was sued for sexual harassment." (Tr. 581.) He continued to direct a string of profanities towards her and Figueroa because of their complaints that he had subjected them to unwanted sexual advances. A coworker, Betty (last name unknown) intervened and told them to stop the argument because customers in the retail area could hear the shouting. (Tr. 582.) The argument ended and everyone returned to work. Thereafter, Soto finished her shift and left work. The following Friday (July 7) she was scheduled to work her normal shift. However, Soto was notified through her aunt that Respondent had changed her work shift from 4 a.m to 4 p.m. to 2 p.m. to 4 a.m. (Tr. 582.) Soto testified that she telephoned Olguin and, "I told him not to change me over to the nightshift because the children's father worked at night and I wouldn't have anybody to leave the children with." (Tr. 583.) When he refused to change his decision, she accused him of changing her shift in retaliation for the complaints of sexual harassment she made against Adrian. According to Soto, Olguin leveled profanities at her and hung up the phone. Soto did not return to work because there was no one at night to care for her children, ages 5 and 11. (Tr. 584.) July 4, 2011, was her last day of employment with Respondent.

Respondent insisted Soto was transferred to the afternoon shift because she was engaged in excessive conversation with Figueroa. (Tr. 299.) He denied overhearing other workers discussing non work related issues. (Tr. 303–304.) According to Respondent, the productivity on the morning shift suffered because of the socializing between Soto and Figueroa. (Tr. 817–818.)[13]

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sistent with the totality of the evidence. Further, Respondent presented no evidence to refute her on this point.

[11] Olguin denied that Soto or Figueroa complained to him about Adrian sexually harassing them prior to their filing a charge with the Arizona Attorney General's Office of Civil Rights Division (AZ Attorney General) in October 2011. Although Olguin denies knowledge of complaints about sexual harassment, I do not find him credible on this point. Unlike the charging parties, Respondent was not able to provide any persuasive corroborating testimony or other evidence to support his assertion that Soto and Figueroa never complained to him about sexual harassment. Respondent provided testimony from Yolanda Gonzalez, current employee, to support his assertion that he was unaware of allegations of sexual harassment. Gonzales testified that she never witnessed Adrian making sexual remarks towards the women at the factory but claimed to have observed Figueroa making sexual comments to Adrian. (Tr. 668–671.) However, she admitted that she "believe[d]" she worked with Soto on just two occasions. (Tr. 641.) Her limited contact with Soto, therefore, is insufficient to show that she was in a position to observe in 2011 that Soto never made allegations of sexual harassment to Respondent. Furthermore, credible corroborating testimony was provided by Pineda that he too witnessed Soto being sexually harassed by Adrian and complained about it to Respondent.

[12] Olguin testified that he did not know if Adrian denied her request to be absent from work on July 3. (Tr. p. 308.) I credit Soto's testimony on this point. Except for Olguin's one line denial, the evidence is uncontradicted that Adrian refused her request for a 1 day leave of absence for July 3rd prompting her to again ask Olguin to grant her request.

[13] I do not credit Olguin's testimony. Olguin claimed that he overheard Soto and Figueroa discussing nonwork related matters each time he went to the factory to pick up tortillas for delivery. Respondent insisted Soto was transferred to eliminate her socializing with Figueroa and increase production on the morning shift. Olguin was unable to produce documentation showing a decrease in productivity for the period at issue. Olguin alleged production numbers were recorded on paper at the beginning of each shift. He noted, "At 4 a.m., they had to leave me a note of how much was produced up until 4 a.m." (Tr. 804, 806.) He testified that at 7 a.m. he would "recount" the tortillas generated between 4 a.m. to 7 a.m. daily to ensure the accuracy of the production count. At 8 p.m. nightly he also counted the tortillas generated on the morning shift. (Tr. 804–807.) According to Olguin, the morning shift was producing 120 less packages of tortillas than normal. However, Respondent was unable to produce records or corroborating testimony to support his defense on this point.

Second, Respondent's argument that Soto and Figueroa were the only employees engaging in conversation that was not work related strains credulity. By his own admission, Olguin testified that he spent most of his time away from the factory delivering tortillas to customers. He testified, "I am never there [the tortilla factory]. I am always working by delivering." (Tr. 272.) Therefore, his opportunity to overhear the workers' conversations was, by his own admission, extremely limited. If he indeed observed Soto and Figueroa talking together, those occasions would have been infrequent. The infrequency of his observation of charging parties' engaging in nonwork related conversation would not be sufficient to justify his excuse that he transferred Soto because she was the sole reason for a decrease in production numbers. Despite

4. Figueroa's and Pineda's work stoppage due to staff shortage and their subsequent discharges

On September 4, 2011, Pineda, Figueroa, and Graceila (Fuentes) reported for the morning shift at 4 am. However, after assessing the situation, they determined that with just three workers reporting for duty, each one would have to spend too much time in the hottest area of the factory, near the wheel and griddle. Pineda explained that with four workers, each person spent a half hour on each rotation in the heat by the griddle and wheel. However, with only three people working, each person had to rotate into the area for an hour each time. (Tr. 369.) Therefore, he called Adrian at 6 am to request that a fourth worker be sent to help them. Adrian stated he would get a fourth person to assist them. They continued cooking the tortillas while waiting for the fourth worker to arrive. At approximately 7 am, Pineda again called Adrian because the fourth worker had not arrived. Pineda told Adrian, "That it was too hot and with only three people that it was impossible to continue working without stopping throughout the entire day." (Tr. 371.) Adrian arrived at approximately 7:30 am and began yelling at the workers to make tortillas. Pineda again complained to Adrian that they needed another worker to help because they had been working short handed for several days. Adrian told him they would not get a fourth worker to assist them because the person he called would not answer the phone. (Tr. 372–373.) Pineda and Adrian continued to argue about the need for a fourth worker on the shift. (Tr. 372–373.) Finally, Adrian told him "Go to hell, you're just a crybaby. Get the hell out of here." Pineda and Figueroa left the building. (Tr. 373.)[14]

Figueroa corroborated Pineda's testimony regarding the events of September 4. She told Adrian she could not work with just three workers because it made the job hotter and harder.[15] (Tr. 488.) Adrian told them, "That he wasn't going to bring any fourth person, that if we wanted to work, to work like that, and if not, to go to hell."[16] (Tr. 495.) Shortly thereafter, Figueroa and Pineda left the factory together because a fourth worker had not arrived.

5. Olguin telephones figueroa and Pineda after their walk out

Adrian called Olguin (who was in Mexico) to inform him that the morning shift was missing a fourth worker and two other workers (Pineda and Figueroa) were threatening to leave. Olguin told Adrian to find a fourth worker. According to Olguin, Adrian again called to notify him that a fourth worker, Jesus Arvizu (Arvizu), had arrived to work. Therefore, Olguin instructed Adrian to call Pineda and Figueroa to tell them they should return to work because he got a fourth worker to help them. (Tr. 821–823.)[17]

Pineda testified that Olguin told him he did not know if a fourth worker had arrived at the factory or if Adrian would be able to get a fourth worker to help them that day.[18] He testified

his insistence that other workers were not engaging in excessive nonwork related conversations, I do not find him credible. When questioned about employees complaining to him about broken equipment, he claimed he was in the factory infrequently but changed his testimony to note that daily he overheard conversation between Soto and Figueroa because he was often in the factory. This type of contradictory testimony weighs negatively on the overall credibility of his testimony.

[14] I find Pineda's testimony credible on this point. It was corroborated by a witness, Figueroa. Further, Adrian did not provide testimony and Respondent did not provide persuasive evidence to refute Pineda on this point.

[15] Pineda identified "Graciela" as the third worker present at the factory that day. However, Figueroa identified the third worker as "Chella." (Tr. 488.) The record is unclear if "Graciela" and "Chella" refer to the same worker. The record establishes, nonetheless, that the parties agree that prior to Adrian's arrival at the factory; there were only three workers present.

[16] The interpreter corrected her interpretation of la verga to note the proper translation is "To go fuck off" and not "to go to hell."

[17] I do not credit Olguin's testimony that a fourth worker was secured to assist the employees for the remainder of the shift. Olguin admits that he does not know from first-hand observation if a fourth worker ever appeared for work that day. (Tr. 823.) Respondent produced Arvizu to corroborate Olguin's contention that he got another worker to assist Figueroa and Pineda. Although, Arvizu testified he was the "fourth worker" and arrived to work on September 4, 2011, at "7:00 or 8:00," I find he woefully lacked credibility. The majority of his testimony was accompanied by smirks, sarcasm, and evasion. He gave intentionally deceptive and often confusing testimony. An example is Arvizu's testimony that he had worked for Respondent for the past two (2) to three (3) years and in 2011 he worked the entire year. He claimed that in 2011, for approximately 1 to 2 months he worked the same shift with Soto and Figueroa. On cross-examination, however, when presented with evidence of his 2011 incarcerations and deportation he continued to provide evasive answers and never admitted that he could not have worked for Respondent for all of 2011. Based on the documentation in evidence, Arvizu was incarcerated from approximately March 18, 2011, to April 17, 2011, and again arrested in May 2011. After being confronted with the documentation, Arvizu reluctantly admitted to being incarcerated for 30 days in March 2011 and again in June 2011 before being deported to Mexico (GC Exh. 38–40). The record is devoid of evidence showing when or if Arvizu was readmitted to the country in 2011. During direct examination, Arvizu also gave confusing, vague, and senseless responses to questions on direct and cross examination. For example, Respondent attempted to use Arvizu to show that Adrian did not perform supervisory functions. Arvizu was asked which management official he reported machine malfunctions and his response was he "thinks" at some point in 2011 a machine broke and he "thinks" someone told Respondent about the malfunction and he "thinks" Respondent fixed it. (Tr. 715.) His response was so riddled with ambiguity and vagueness that it was useless. Most of his testimony consisted of this type of vague and contradictory responses. Early in his testimony he stated that in 2011 he did not have any problems at work. (Tr.713.) However, later in his testimony he proceeded to testify that in August 2011 he went to Respondent to complain about a problem on the production line. (Tr. 749.) In addition to contradicting his earlier testimony that he never experienced problems in the work place in 2011, it was previously noted that there is no evidence to show when, after his deportation in approximately July 2011, he was readmitted into the United States. (GC Exh. 38–340.) Therefore, it is impossible to credit his testimony that in August 2011, he complained to Respondent about problems on the production line. Based on the evasive, confusing, and vague responses he gave on both direct and cross-examination and his overall demeanor, I find his testimony to be worthless and it fails to support Respondent's defense. Furthermore, Adrian did not appear for the hearing. Therefore, there is no testimony from Adrian corroborating the substance of his conversation with Olguin or whether he was able to get a fourth person to work.

[18] Olguin denied telling Pineda or Figueroa that Adrian was unable to get a fourth worker. He insisted that Adrian got another employee to work and communicated that information to Figueroa and Pineda. I

Olguin told him, "Adrian was going to fix that." (Tr. 444.) Pineda and Figueroa insist that management never informed them that a fourth person arrived at the factory to work. I find that the weight of the evidence supports them on this point.[19] Approximately an hour after Pineda and Figueroa left the factory, Olguin telephoned Pinedea and instructed him to return to work or he would be terminated. Olguin told Pineda, ". . . to go back to work because if not, I wasn't going to be working there anymore." (Tr. 374.)[20] Pineda did not return to the factory because Respondent could not assure him to his satisfaction that a fourth worker had been procured to assist them with the work. (Tr. 443–444.) Olguin also called Figueroa from Mexico at approximately 9 a.m. the same day and told her if she did not return to work immediately she would be fired. (Tr. 496.) Figueroa responded to Olguin, "okay, that's fine" and did not return to work. (Tr. 497.)[21]

6. Respondent rehires Figueroa but a subsequent shift change results in her termination

Approximately 2 weeks after Figueroa walked out of the factory with Pineda, Olguin called to ask her if she wanted to return to work. She agreed and was rehired to work 4 a.m. to 4 p.m. from Friday to Monday. (Tr. 317–318, 497–498.) This is the schedule she had worked throughout her employment with Respondent, except for a brief period when she worked the evening shift at her request because her mother was ill. The Friday after she agreed to return to work, she reported for duty and worked the morning shift from Friday through Monday. Soon after her return, Figueroa and Adrian had a disagreement regarding her packaging of several tortillas. She noted, "He [Adrian] started unpacking the dozen pack tortillas that I had packed because a client arrived asking for a three dozen pack." (Tr. 499–500.) She complained to Respondent because, according to her, that was not the proper procedure for making a three (3) dozen package of tortillas. In response to her complaint Respondent replied, "That not even he [Olguin] could control him [Adrian]." (Tr. 501.) The following Thursday she called Respondent to ask if she should report to work the following day at 4 a.m. or 6. She called to confirm her reporting time because, ". . . many times the nightshift finishes early, so then two people show up at 4 in the morning to start getting the dough ready. Two other people will show up around 6 in the morning to start getting the griddles and everything else going." (Tr. 501.) Respondent instructed her to report at 6 a.m. the following day. Later that same day, a coworker, Macario, called to tell her that Adrian had changed her start time to midnight. She told him Olguin scheduled her to report for work at 6 a.m. and that was the time she would report for work. She went to work the next day at 6 a.m. but Arvizu shouted to her to go home because Adrian had assigned her to work the evening shift. She tried several times to call Olguin but he did not answer his phone. Eventually Adrian answered Olguin's phone and told her Olguin had changed her reporting time to 4 p.m. Olguin testified that he transferred Figueroa to the evening shift because, "I needed her in the evening because production was low, and she knew how to do her job well."[22] (Tr. 321.) Figueroa again reminded him she could not work that shift because she was unable to obtain childcare for her children at night. (Tr. 503–509.) Olguin refused to reverse his decision so Figueroa did not return to work. Olguin waited 2 days for Figueroa to return to work before eventually hiring a replacement worker for her position. (Tr. 321.)

IV. DISCUSSION AND ANALYSIS

A. Legal Standards

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). A conversation can constitute concerted activity

find, however, that Figueroa's and Pineda's testimony is more credible on this point than Olguin. Adrian did not provide testimony contradicting Pineda's version of their argument about his failure to get a fourth worker to assist them. Pineda also had corroborating testimony from Figueroa that Olguin never assured them a fourth work had arrived and threatened them both with termination if they did not immediately return to work. Olguin, by contrast, admitted he had no first-hand knowledge that a fourth worker appeared to work for the period at issue, nor first-hand knowledge regarding the substance of Adrian's conversation with Figueroa and Pineda.

[19] I credit Figueroa's and Pineda's testimony on this point. Olguin had not first-hand knowledge of what information or if Adrian conveyed any information to Figueroa and Pineda about a fourth worker.

[20] Olguin denied making this threat, but I do not credit him on this point. I carefully observed Olguin's and Pineda's demeanors as they testified on this point. Pineda was poised, forthright, and composed. His testimony was consistent; and he avoided evasive, vague, or combative responses. I found his testimony overall and on this point specifically to be consistent with the evidence. There were no contradictions on the material facts and a few slight variations regarding minor details. In contrast, Olguin overall demeanor was of evasiveness and contradiction. He repeatedly had to be cautioned by his attorney, me, and attorney for the General Counsel against giving nonresponsive answers. As I noted at other points in the decision, Olguin gave several contradictory responses on material facts which negatively reflects on his overall credibility.

[21] I credit Figueroa's testimony regarding the events of September 4 because she was consistent in her statement of the events of that day, there is credible testimony corroborating her version of events, and her overall demeanor adds to the credibility of her testimony.

[22] Again, I do not find Olguin's denial credible. He "conveniently" failed to produce the documentation which allegedly shows there was a significant decrease in production on the evening shift.

when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3rd Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Sabo, Inc.*, 359 NLRB No. 36, slip op. at 4–5 (2012).

An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives Corp*., 358 NLRB 1 (2012) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[23] analysis to 8(a) (1) concerted activity cases that involve an employer's motivation for taking an adverse employment action against employees. *Sabo, Inc*., supra; *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in concerted activities; (2) the concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Sabo, Inc.*, at 5. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity.

[23] 251 NLRB 1083, 1089, (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

B. July 4, 2011 Transfer of Mariela Soto and Subsequent Termination[24]

The General Counsel alleges that on July 7, 2011, Respondent transferred Soto to a different work shift, thus causing her termination because she engaged in concerted protected activity.

Soto's Transfer to a Less Desirable Shift

In order to sustain its initial burden of proof, the General Counsel must first prove that Soto's protected activities were the substantial or motivating factor in Respondent's decision to transfer her. Upon such a showing, Respondent then must present evidence that it would have transferred Soto even absent the protected concerted activity. See *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2.

The evidence established that Soto engaged in concerted activities when she voiced complaints to coworkers and Respondent about the working conditions in the plant (excessive heat, broken equipment, lack of protective gear, inadequate pay, and sexual harassment). Her actions were clearly an attempt to protect her and other workers from what she perceived to be unsafe and unfair working conditions. The Board has held concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Myers II*, 281 NLRB at 887. Soto's complaints and acts are the epitome of concerted activity.

In addition, she complained to and worked with Figueroa, Pineda and other coworkers in an effort to convince Respondent to pay them the minimum wage required by law and provide them with the overtime pay to which they were entitled. (Tr. 358–361, 564–565.) In *Sabo, Inc*., supra, 359 NLRB at 3, the Board held that wage discussion is "inherently concerted" activity. See *Automatic Screw Products Co*., 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992).

I find that the evidence establishes Respondent had knowledge of the concerted activity. As previously discussed, I do not find credible Respondent's testimony that neither the charging parties or any other worker complained to him about improper wage payment and lack of overtime pay. Also, Olguin admitted that workers complained to him regarding equipment failures and the excessive heat generated by some of the equipment malfunctions. (Tr. 266–268.) Olguin did not

[24] Although the General Counsel phrases the issue as a termination, it is clear from Respondent's answer to the complaint, both parties' posttrial briefs, and the evidence that the alleged charge is a constructive discharge. Therefore, I have analyzed the issue of the "termination" as a constructive discharge.

persuasively rebut Soto's testimony that she brought such complaints to his attention. *Sabo, Inc*., at 4; *Aroostook County Regional Opthalmology Center*, 317 NLRB 218, 220 (1995), enfd. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996).

Next, I find that Soto's complaints to coworkers and Respondent about wages, workplace sexual harassment, and workplace induced illnesses meet the Act's definition of protected activity. In *White Oak Manor*, 353 NLRB 83 (2009), the Board continued its precedent of holding that Section 7 protects activity unrelated to union organizing. Employee complaints of sexual harassment in the workplace and workplace hazards have been held by the Board as protected. Board law is also clear that wage discussions, as in this case, is "inherently concerted" and protected because it is likely "to spawn collective action." *Sabo, Inc*., at fn.11 (quoting *Aroostook County*, supra.).

The remaining question is whether Respondent transferred Soto because of discriminatory animus. It is clear that there was tension and hostility between Soto and Adrian. It has also been established that Soto repeatedly complained, individually and in concert with other employees, about Adrian's behavior to Olguin. It is not unreasonable to infer from the evidence that her repeated complaints to the owner of the company (Olguin) about his son and supervisor (Adrian) would engender animus against her. It has also been established that at least several days prior to her transfer, Olguin knew she had small children. Thus, management's hostility towards her combined with its knowledge of her childcare concerns strongly indicates that the transfer was made to retaliate against her for exercising her Section 7 rights. The timing of her transfer occurring within days of Adrian's profanity laced outburst against her for complaining to Olguin about his sexually harassing conduct also establishes a strong inference discriminatory animus was a motivating factor in Respondent's decision to transfer her to the evening shift. Accordingly, I find that the General Counsel met his initial burden of showing discriminatory motive.

I also find that Respondent has not met its burden of showing that the transfer would have taken place even in the absence of the protected conduct. See *Wright Line*, supra, 251 NLRB at 1089; *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3–4 (2011) (discharge violated Section 8(a) (1) because respondent failed to meet Wright Line rebuttal burden).

Respondent argues that it transferred Soto to the evening shift because her performance on the morning shift was poor. Olguin complained that that he had to separate Soto and Figueroa from working together because they socialized too much and did not work quickly enough, thus causing a drop in the morning production numbers. (Tr. 299–304, 812–813, 817–818.) He produced, however, only unsubstantiated assertions. It again must be emphasized that despite Olguin's testimony regarding his detailed daily production count for each shift, he was unable to produce records or corroborating testimony to support his contention that he had to transfer Soto to increase her productivity and "normalize" production on the morning shift. (Tr. 299, 301–304, 817–818.) Thus, I find that Respondent's transfer of Soto from the morning shift to the afternoon shift violates Section 8(a)(1) of the Act.

Respondent Constructively Discharged Soto

The General Counsel alleges that Respondent, in retaliation for Soto's concerted protected activity, transferred her to the evening shift to force her to resign. The Board has articulated two theories for analyzing actions involving constructive discharge. The test for determining if a constructive discharge falls under the "traditional" theory is if the employer has deliberately made the working conditions unbearable and it is established (1) the burden placed on the employee was caused or intended to cause the employee to resign; and (2) the burden was imposed because of the employee's protected activity. The "Hobson's Choice" theory occurs when the employee voluntarily resigns because the employer conditions continued employment on the employee's relinquishment of Section 7 rights. *Intercom 1 (Zercom),* 333 NLRB 223 (2001); *Engineering Contractors, Inc.*, 357 NLRB No. 127 (2011).

I find that Respondent knew or should have known that its transfer of Soto to the evening shift would result in an untenable situation for Soto. Olguin admitted he was aware Soto had children. He also acknowledges that when she was notified of her reassignment to the afternoon shift, she explained to him she could not work it because she did not have child care for her children. (Tr. 305.) Olguin never produced evidence that her excuse was false or asserted that he disbelieved her explanation. Despite Soto's pleas against the change, Respondent insisted on transferring her to a shift he knew she could not work. In a case similar to the fact pattern at issue, the Board found that refusing to grant an employee's request to transfer shifts because she could not afford childcare to accommodate a different shift constituted constructive discharge because the employer knew and should have reasonably foreseen, that refusing the shift transfer would force the employee to resign. *American Licorice, Co*., 299 NLRB 145, 148–149 (1987). See also, *Baker, Harold W., Co*., 71 NLRB 44, 60–61 (1946). Second, it must again be noted that the timing of her transfer occurring within days of Adrian's profanity laced outburst against her for complaining to Olguin about his sexually harassing conduct also establishes a strong inference that discriminatory animus was a motivating factor in Respondent's decision to transfer her to the evening shift, thus resulting in her discharge. I find the evidence establishes that Respondent deliberately chose an employment action to take against Soto that it knew would make her working conditions so unbearable that she would be forced to resign.

Based on the totality of the evidence, I find that Respondent transferred Soto thus causing her termination in violation of Section 8(a)(1).

C. Respondent's Illegal Threat to Discharge of Figueroa and Pineda for Engaing in a Work Stoppage

The General Counsel alleges that on or about September 4, 2011, Respondent, through Olguin, threatened its employees with discharge because they stopped working concertedly and engaged in a strike. The test for a violation of Section 8(a)(1) is whether, considering of all the circumstances, the employer's conduct or statements had a reasonable tendency to restrain, coerce, or interfere with employees' rights guaranteed by Section 7 of the Act. *Mediplex of Danbury,* 314 NLRB 470, 472

(1994).

The General Counsel argues Figueroa and Pineda engaged in a "classic" work stoppage protected by the Act when they walked off the job to protest the lack of a fourth worker on the shift and the excessive heat in the factory. Therefore, according to the General Counsel, Respondent's threats to terminate Figueroa and Pineda if they did not return to work are a violation of Section 8(a) (1) of the Act. Respondent denies Pineda and Figueroa were threatened with termination if they did not return to work during their work stoppage.

I find that Pineda's and Figueroa's work stoppage on September 4 constitutes concerted protected activity. *Post Tension of Nev., Inc.,* 352 NLRB 1153 (2008). The evidence is uncontradicted that for the period at issue the shift was short staffed and the factory was excessively hot for those working that day. There is no persuasive evidence that either Pineda or Figueroa would have walked off the job but for the inadequate staffing level and heat at the factory. The record shows that these two factors were the direct cause of the walkout. In *Magic Finishing Co*., 323 NLRB 234 (1997), the Board found a violation of the Act where three (3) employees left the job to protest unbearably hot working conditions. Likewise, Pineda and Figueroa walked off the job after repeatedly complaining to Respondent that they needed additional staffing to complete their work because it was too hot to work at the current staffing levels. See also, *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962).

Respondent denies that Figueroa and Pineda were threatened with termination if they did not immediately return to work after their walk out. As previously discussed, I do not find credible Olguin's testimony that he did not threaten to terminate Figueroa and Pineda because they walked off of the job to protest inadequate staffing and excessive heat in the factory. Earlier in the decision I detailed my reasons for finding Figueroa and Pineda were more credible than Olguin on this point based on their overall demeanor. Furthermore I credit Pineda's testimony because it is consistent within the context in which it occurred. It is uncontradicted that the morning shift was short staffed; the lack of a fourth worker required working longer in the hottest area of the factory; and Adrian told the workers they would have to work short staffed or leave the premises. (Tr. 372–373) There is no evidence refuting Pineda's and Figueroa's testimony that Pineda repeatedly questioned Adrian and Olguin about giving them assistance that day. Figueroa corroborated Pineda's testimony on this point. While each made statements that the other did not, there were no contradictions on the material facts and only slight variations regarding minor details. These are slight variations one would expect in witnesses' observations. Within that context it is credible that Olguin, like Adrian had earlier, threatened them if they did not cease their work stoppage and return to work. Further, I found Pineda's overall demeanor to be a consistently credible throughout his testimony. He maintained an even tone, refrained from smirks, evasive responses, and vague or combative responses.

Figueroa also credibly testified that Olguin called her within a few hours of her walk out and threatened her with termination if she did not immediately return. I also credit her testimony on this issue because of her overall demeanor and the consistency of her testimony. Her testimony is credible because there is evidence that she had been complaining with other workers and to Olguin throughout the summer that the factory was excessively hot and causing workers to become ill. There is uncontradicted evidence that she and Pineda had been working short staffed for several days prior to their work stoppage. Again, the overall context of the situation makes it more probable than not that during his call to Figueroa; Olguin threatened her with discharge if she did not return to work. In addition, I find Figueroa was a credible witness because she avoided histrionics, provided concise and consistent responses, and refrained from tailoring her responses in a light she may have thought was most helpful to the General Counsel's case.

In *Central Valley Meat Co*., 346 NLRB 1078 (2006), the Board held that threatening employees with termination for engaging in a protected work stoppage violates Section 8(a)(1) of the Act. Pineda and Figueroa were subject to such an attempt when Respondent threatened them with termination in retaliation for engaging in a protected work stoppage. I therefore find that Respondent's threat to terminate employees Figueroa and Pineda if they did not return to work following a protected work stoppage violated Section 8(a)(1) of the Act.

G. September 4, 2011 Discharges of Figueroa and Pineda

The General Counsel alleges Respondent subsequently discharged Figueroa and Pineda in retaliation for engaging in protected concerted activity. The *Wright Line* standard governs whether they were discharged in violation of Section 8(a)(1).

The General Counsel must first prove, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in Respondent's decision to discharge them. The General Counsel satisfies this burden by showing that Figueroa and Pineda engaged in protected concerted activity when they participated in a work stoppage; Respondent has knowledge of the work stoppage; and Respondent had discriminatory animus towards their protected activity. Circumstantial evidence may be used to show animus. *Camaco Lorain Mfg., Plant*, 356 NLRB No. 143 slip op. at 4 (2011).

I have previously discussed and found that the work stoppage constituted concerted protected activity and Respondent was aware of it. Respondent denies discriminatory animus towards the employees' protected activity. Respondent argues Figueroa and Pineda voluntarily quit; and their walk out ceased to be protected activity once they refused to return to work after being informed that the staffing shortage had been resolved.[25] (R. Br. 33–34.) However, I find Respondent discharged Figueroa and Pineda. Moreover, I find Respondent would not have taken that action absent them engaging in concerted protected activity.

The employer is responsible for creating an atmosphere, through words or actions, of uncertainty for employees regarding their employment status. The judge must make a determination "from the perspective of the employees" and that deter-

[25] I reject this argument. Earlier in the decision I discussed in detail my rationale for finding Figueroa and Pineda were not informed that the staffing shortage and excessive heat in the factory had been resolved.

mination is based on "whether the employer's statements or conduct would reasonably lead the employees to believe that they had been discharged." *NLRB v. Hilton Mobile Homes*, 387F.2d 7, 9 (8th Cir. 1967). See *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982).

Adrian's conduct upon his arrival at work September 4 would be sufficient to reasonably lead Figueroa and Pineda to believe they would be discharged if they did not continue to work despite their concerted complaints about the staffing shortage and excessive heat. From the perspective of the employees, his status as Respondent's supervisor and agent would also reasonably cause them to believe they would be discharged if they engaged in a work stoppage. In response to their complaints about working short staffed and in excessive heat, Adrian leveled profantities at them, stated a fourth worker would not be coming, and told them to "Get the hell out of here." (Tr. 372–373.) He also told them if they were not willing to work short staffed and in the excessive heat then "To go fuck off." (Tr. 495.) Olguin reinforced this message when he told Figueroa and Pineda that regardless of the status of the staffing shortage and other complaints, they would be fired if they did not immediately return to work. From the perspective of the employees, I find Adrian's and Olguin's statements would reasonably lead them to believe that they had been discharged and were in fact discharged. The Respondent's animus against Figueroa's and Pineda's concerted protected activity is evidenced by Olguin's threat to discharge them if they did not cease their protected work stoppage. The timing of the discharges, essentially simultaneously with the threat, supports a finding of that discriminatory animus motivated the adverse employment actions.

The General Counsel has made an initial showing of discrimination, therefore the burden shifts to Respondent to show that it would have terminated Pineda and Figueroa even absent the protected activities. However, the Respondent fails to advance a nondiscriminatory reason for its action, other than to insist the employees were not terminated but rather voluntarily quit. As I previously addressed in the decision, this argument fails.

Based on the totality of the evidence of record, I find that the General Counsel has established that Respondent discharged Pineda and Figueroa for engaging in concerted protected activities in violation Section 8(a)(1) of the Act.

F. Mid-September 2011 Transfer and Termination of Figueroa

In mid-September 2011, Respondent rehired Figueroa. The General Counsel alleges that upon her re-hire and initial assignment to the day shift, Respondent subsequently transferred Soto to a different work shift, thus causing her termination because she engaged in concerted protected activity.

I find that the General Counsel has failed to establish that the reassignment of Figueroa to a different work shift, thus causing her termination violated Section 8(a)(1) for the reasons discussed below

The General Counsel posits that upon her rehire (mid-September), Figueroa continued her concerted protected activity when she complained to Respondent that Adrian unpacked nine bags of tortillas that she had previously packaged. The General Counsel argues this action is protected concerted activity because it is evidence that Respondent feared she would continue to be outspoken and agitate for workplace rights on behalf of herself and the other workers. (Tr. 498–501; GC Br. 25.) I find, however, that clearly the complaint about Adrian unpacking her previously packaged tortillas is not concerted protected activity. There is no persuasive evidence to prove that her complaint was done for the mutual aid or protection of herself and other employees. It was an individual complaint in attempt to resolve a workplace dispute for the benefit of one person, Figueroa. The General Counsel failed to articulate a strong argument or provide case law to establish that this incident constitutes protected activity. The General Counsel could possibly overcome this deficit by presenting persuasive evidence that, upon her return, Respondent continued to harbor discriminatory animus against Figueroa such that her transfer and subsequent termination were motivated by her prior concerted protected activity (activity that occurred before her discharge on September 4). However, the record is devoid of such evidence. The record contains minimal testimony or other evidence to support the General Counsel's case on this issue.

Based on the totality of the evidence of record, I find that Respondent did not violate section 8(a)(1) when Figueroa was transferred to the evening shift resulting in her termination.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Adrian Olguin is a supervisor and an agent of Respondent within the meaning of Section 2(11) and (13) of the Act.
3. By discriminatorily transferring employee Mariela Soto on July 7, 2011, from the day shift to the night shift because of her concerted protected activities, which caused her termination, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
4. By discriminatorily threatening Alan Pineda and Anahi Figueroa with termination because of their concerted protected activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
5. By discriminatorily discharging employees Alan Pineda and Anahi Figueroa on or about September 4, 2011, because of their concerted protected activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
6. Other than specifically found herein, Respondent has engaged in no other unfair labor practices.

Remedy[26]

In finding that the Respondent, Don Chavas, LLC d/b/a Tortillas Don Chavas, has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I will recommend that

[26] Respondent argues that the complaint must be dismissed if it is determined that the Charging Parties are undocumented aliens because the Board lacks the power to order backpay and reinstatement to undocumented aliens. (R. Br. 36.) The employee's immigration status and "its effect on the remedy are left for determination at the compliance stage of the case." See *Tuv Taam Corp*., 340 NLRB 756, 759–761 (2003).

Respondent be ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

Because I have found that Respondent unlawfully transferred employee Mariela Soto to the night shift resulting in her termination, I will recommend that Respondent be ordered to reinstate Mariela Soto on the day shift (4 a.m. to 4 p.m.). Because I have found that Respondent unlawfully discharged employees Alan Pineda and Anahi Figueroa, I will recommend that Respondent be ordered to reinstate both employees to the shifts they were assigned to (4 a.m. to 4 p.m.) before the discriminatory action. I also recommend that all three employees be made whole for any loss of earnings and benefits they suffered as a result of the discrimination against them from the date of the discrimination to the date of their reinstatement as provided in *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminates for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Don Chavas, LLC d/b/a Tortillas Don Chavas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging or constructively discharging its employees due to their engaging in concerted protected activities.

(b) Threatening to discharge its employees for engaging in concerted protected activities.

(c) Transferring to less desirable shifts its employees for engaging in concerted protected activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within fourteen (14) days from the date of the Board's Order, Respondent must offer Mariela Soto, Alan Pineda, and Anahi Figueroa full reinstatement to their former jobs or, if any of those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mariela Soto, Alan Pineda, and Anahi Figueroa whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within fourteen (14) days from the date of the Board's Order, Respondent must remove from its files any reference to the unlawful discharge and constructive discharge of Mariela Soto, Anahi Figueroa, and Alan Pineda and within three (3) days thereafter notify the employees in writing that you have taken this action that the discharges will not be used against them in any manner, including but not limited to, as a basis for future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

(d) Within fourteen (14) days, preserve and, on request, make available to the Board or its agents for the examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within fourteen (14) days after service by the Region, post at Respondent's Tucson, Arizona tortilla facility and all its other factories (if applicable) in the State of Arizona, in both English and Spanish a copy of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2011.

(f) Within twenty-one (21) days after service by the Regional, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 15, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

[27] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or constructively discharge you because you engage in concerted work stoppage.

WE WILL NOT threaten to discharge you for engaging in concerted protected activities.

WE WILL NOT transfer you to a different work shift because you engaged in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL, within Fourteen (14) days from the date of the Board's Order, offer Mariela Soto, Alan Pineda, and Anahi Figueroa full reinstatement to their former jobs or, if any of those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for the wages and benefits they lost, plus interest, as a result of our unlawful conduct.

WE WILL, within fourteen (14) days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and constructive discharge of Mariela Soto, Anahi Figueroa, and Alan Pineda and within three (3) days thereafter WE WILL notify the employees in writing that we have taken this action that the discharges will not be used against them in any manner, including but not limited to, as a basis for future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against

DON CHAVAS, LLC D/B/A TORTILLAS DON CHAVAS